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No. 82-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ATLAS TILE & MARBLE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

JAMES R. SHAHADY

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I

THE RESPONDENTS' CHARACTERIZATION OF THE CASE BELOW AS "FACT BOUND" IS ERRONEOUS

The Federal Respondent in its brief in opposition states that the finding below is "fact bound" and a "narrow ruling concerning the exercise of discretion". Brief in Opposition, at 6, 9. Yet when the opinion below was initially filed as an unpublished memorandum, the Federal Respondent filed a Motion for Reconsideration of Decision Not to Publish Memorandum Opinion, in which it stated as follows:

> The Court's disposition of this case resolves an important question under the Longshoremen's Act, namely, whether the constructive-refusal doctrine of *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); has continued vitality subsequent to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, and constitutes the only judicial precedent on that question.

Motion filed June 17, 1982, at 1-2.

The Federal Respondent's belatedly expressed view of the decision below as resolving primarily factual issues appears designed to protect the apparently prized precedential value it perceives in the Appeals Court's resolution of the "important question" rather than to relieve this Court from entering into a factual fracas.

II

THE FEDERAL RESPONDENT'S CHARACTERIZATION OF THE HOLDING BELOW IS MISTAKEN

The Federal Respondent characterizes the Court of Appeals holding below in terms suggesting it to have far less reach than it actually has. The Federal Respondent states that:

> . . .the court of appeals held only that discharge of an employee by a doctor to whom the employer has referred him *may* amount to a refusal by the employer to provide requested medical services.

Brief in Opposition at 6. (Emphasis in original.) Federal Respondent characterizes the Board's excusal for failure to file medical reports as follows:

> That ruling followed directly from its holding that the employer had refused to provide further treatment and from the Board's own precedent establishing that in such circumstances, failure to file timely reports *may* be excused.

Brief in Opposition at 9. (Emphasis added.)

To the contrary, however, the Court of Appeals holding was not of the permissive variety, such that reporting *may* be excused or that discharge from medical care *may* amount to refusal of medical care. Rather, in reversing outright the opinion below, the Court of Appeals *mandated* a holding that upon the happening of a certain event (i.e. being "told" by "the employer's physician"[1] that he needs no further care) a claimant is freed from the terms of the statute to seek medical treatment on his own initiative and later reporting requirements are excused *as a matter of law*. (App. 9a, 11a) The suggestion that the holding below merely permits certain legal conclusions, therefore, seriously understates the thrust and nature of the Court's ruling.

III

RESPONDENTS INTERPRET THE SCOPE OF THE DECISION BELOW TOO NARROWLY

It is quite obviously in Respondents' interest at this stage of the proceeding to suggest a narrow interpretation of the Court of Appeals' holding and in a casual fashion belittle

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[1]The concept of employer's physician has no foundation in statutory law, and no defined meaning elsewhere. Private Party Respondent's attempt to justify it by Section 14N of the Restatement, Second, of Agency is meritless on its face, particularly in light of the fact that a physician's medical judgment cannot be considered to be under the control of an insurance company. Brief of Private Party in Opposition at 16-17.

the importance of the case in an effort to convince this Court that it is simply not of sufficient concern to command the scrutiny and attention of the Supreme Court. Respondents' efforts in this regard, however, write into the opinion below limiting factors which simply are not there.

The Court of Appeals did not delve into a factual issue, the resolution of which depended upon unique juxtaposition of factual innuendo. Rather, it created an unyielding rule of law that if a physician initially selected by the employer and carrier *tells* a claimant at any time that he needs no further care, then the regulations and statutes pertaining to medical reporting and change of physician no longer apply.[2]

A reading of the Court of Appeals' decision indicates that this holding would apply (1) even if the employer and carrier had never been directly confronted with a request for treatment; (2) regardless of whether the physician was performing a single independent medical examination or had successfully conducted a lengthy or complicated course of treatment for the claimant; (3) regardless of whether the physician was available for follow-up treatment for as long as the claimant "wanted to come" (App. 9a); and (4) to permit the claimant to consult numerous other physicians even if he already had his own initially and freely chosen physician to whose treatment the employer and carrier had never objected.

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[2]Respondents suggest that the court merely adopted the Fifth Circuit ruling in *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (1971). Brief for the Federal Respondent in Opposition, at 7, 8; Private Party Respondent's Brief in Opposition, at 15-16, 18. To the contrary, however, in *Neuman*, the claimant had ceaselessly exhausted *all administrative avenues* for relief before seeking treatment on his own, while here, the claimant exhausted *none* of the administrative remedies, and is seeking *excusal* from the terms of the statute.

These factors combine to result in practical application of the doctrine announced below to all cases in which there is a difference in medical judgment between a physician selected by the employer and any physician consulted by the employee. As indicated in the case of *Lloyd v. Slatterly Associates, Inc.*, 15 BRBS 100 (September 30, 1982), filed herein as Appendix J, the Benefits Review Board perceives that to be the appropriate interpretation of *Shahady*, notwithstanding that in *Lloyd*, the alleged employer's physician had not even refused to provide treatment. Respondents studiously ignore this subsequent application of *Shahady*, and their suggested limitations of the decision are inconsistent with its later judicial application.

IV

THE FEDERAL RESPONDENT'S RATIONALIZATION FOR EXCUSING NONCOMPLIANCE WITH THE ACT IS NONPERSUASIVE

The Federal respondent suggests that it is appropriate to excuse all manner of compliance with the medical provisions of the Act if it is later determined that the medical treatment procured was "necessary" and "causally related" to the employment injury. Brief in Opposition at 6, 8.

This point underscores precisely the reason why this case has broad and extensive importance far beyond its borders, reaching into the very core of the administration of the medical provisions of the Act. Federal Respondent seems to be urging that no violence is done to the Act where medical supervision of injured workers is shifted from prior and concurrent supervision of treatment by the Deputy Commissioner to an *ex post facto* review of stale facts at a hearing by an Administrative Law Judge at a time when he can do nothing more in the way of medical

supervision than to direct payment or nonpayment of bills. Surely this refocus and redefinition of the concept of medical supervision is not consistent with the statutory scheme, and is utterly ineffective to rationalize the Court of Appeals wholesale elimination of the administrative provisions of §7 of the Longshoremen's and Harbor Workers' Compensation Act.

V

RESPONDENTS' DEFENSE OF THE COURT OF APPEALS INTERPRETATION OF BUCKHAULTS v. SHIPPERS STEVEDORING COMPANY IS INEFFECTIVE

Respondents are conspicuously weak in their attempt to justify the Court of Appeals interpretation of Benefits Review Board precedent of *Buckhaults v. Shippers Stevedoring Company*, 2 BRBS 277 (1975). This is quite understandable since there is no arguable basis to justify that portion of the Court of Appeals' holding. Private Party Respondent's rationalization for the Court of Appeals is as follows:

> Requiring filing of the medical reports after a refusal would not aid the employer or Deputy Commissioner. To expect a claimant to have reports sent to the employer by an unauthorized physician would place an unreasonable burden on the claimant.

Private Party's Brief in Opposition at 20, n.9. While this circular reasoning – that it is unreasonable to require a claimant to start complying with the Act after he has already sought treatment outside its provisions – is catchy, it is not persuasive.

CONCLUSION

Respondents' casual attempts to suggest the limited applicability of the case below are baseless. A Writ of Certiorary should issue.

Respectfully submitted,

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